In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1042

RICHARD LEE BUONOMO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. On October 25, 1965, petitioner was sentenced by an Illinois State court to imprisonment for one to three years. The court specified that the sentence would begin on or about April 1, 1966, to allow time for petitioner to be tried on a federal charge. On November 12, 1965, a ten-count indictment was returned in the United States District Court for the Northern District of Illinois charging petitioner and five others with violating the Dyer Act and with con-

spiracy. Petitioner initially pleaded not guilty to all charges. Subsequently, he entered a plea of guilty to conspiracy and one substantive count, and, on motion by the government, the remaining counts were withdrawn.

A hearing on sentence was held on March 29, 1966. The court noted that a pre-sentence report had implicated petitioner in a massive stolen car network, and had disclosed several prior convictions, including the recent one by the Illinois State court. Noting that petitioner was "not a fit subject for probation," the court sentenced petitioner to concurrent terms of imprisonment for five years to run "consecutive to" his State sentence (A. 4).[1] A request by petitioner for a stay of the federal sentence while he wound up his personal affairs was opposed by the government and denied by the court. Petitioner was then taken into custody of the United States Marshal and confined.

Later that day, government counsel advised the court of his concern that the sentence might be improperly implemented if petitioner was remanded pursuant to the order issued by the court, since the court had failed to consider the effective date of the State sentence (two days hence). Counsel recommended that the court modify its order by resetting bail at $50,000 and postponing the execution of the federal sentence for one week (A. 7). The court, noting that defense counsel was not present, advised

[1] "A." references are to the Appendix portion of Appellant's Brief and Appendix, on file with the Clerk of this Court.

that it would enter the government's motion and continue it until the next morning, when petitioner and his counsel would appear (A. 7). A hearing was conducted the following day, with petitioner and defense counsel present. Petitioner objected to any modification of the sentence, and urged that no mistake had been made (A. 9-10). He also challenged government counsel's contention that authority to modify the sentence could be found in Rule 35, F.R.Crim.P. The court acknowledged that, despite his remark when considering the pre-sentence report that the State sentence was not to begin until April 1st, he had failed to take this deferral into account when pronouncing sentence. The court noted, however, that its intent that the federal sentence be consecutive to the State punishment had been clearly manifested (A. 10). Over objection of defense counsel, the court then ordered petitioner's sentence stayed until April 2, and set bail at $50,000 (A. 14). The court of appeals affirmed (Pet. App. "A").

2. Although phrased in different ways, petitioner's argument is essentially that the court had no power to modify the terms of the sentence to carry out its intention of making the federal sentence consecutive to the State sentence. The argument is without merit and further review, we submit, unwarranted. The court had the power to impose a federal sentence that would commence only upon completion of a State sentence. See *Williams* v. *Taylor*, 327 F.2d 322 (C.A. 10), certiorari denied, 377 U.S. 1002. Such was the court's clearly indicated intention when it imposed

the five-year term to run "consecutive to" the State sentence. This intention should not be thwarted because initially the court inadvertently failed to make specific provision for the two-day hiatus before the State sentence took effect. See *Bellam* v. *State*, 233 Md. 368, 372, 196 A.2d 891, 893. Sentencing procedure is not "a game in which a wrong move by the judge means immunity for the prisoner." *Coy* v. *Johnston*, 136 F.2d 818 (C.A. 9), certiorari denied, 320 U.S. 788; *Bozza* v. *United States*, 330 U.S. 160.

Petitioner relies upon cases where, for example, some counts of a conviction were reversed and the district court attempted to raise the sentence of the remaining counts so as to equal the original aggregate sentence. But there is a significant difference between such circumstances and those presented here. Here the term of the original sentence was lawful but an ambiguity arose in the manner of its implementation; there was no increase in the sentence which the judge from the beginning intended to impose; and the manifest intention of the court was correctly carried out when steps were taken to resolve the ambiguity. *Aga* v. *United States*, 312 F.2d 637 (C.A. 8); *Scarponi* v. *United States*, 313 F.2d 950 (C.A. 10); *Payne* v. *Madigan*, 274 F.2d 702 (C.A. 9), affirmed, *per curiam*, 366 U.S. 761. And the fact that petitioner had been in a federal place of confinement for one day before the court clarified the terms of its sentence did not constitute double jeopardy. *Bozza* v. *United States*, 330 U.S. 160, 167; *Orrie* v. *United States*, 302 F.2d 695 (C.A. 8), certiorari denied, 371 U.S. 864.

Petitioner also argues that since the initial sentence was not illegal the court had no power to correct it under Rule 35. We submit that the court had inherent power—under Rule 35 or otherwise—to assure that the sentence expressed its intention in sentencing. *In re Bonner*, 151 U.S. 242, 260.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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